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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the matter of:	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	)	MM Docket No. 92-266
	)	DOCKET FILE COPY ORIGINAL
Leased Commercial Access	)	CS Docket No. 96-60

COMMENTS
OF
TELE-MEDIA CORPORATION OF DELAWARE

Date: May 15, 1996

I. Introduction/Background.

The Tele-Media organization, ("Tele-Media" or the "Company") founded in October 1970 by Robert E. Tudek and Everett I. Mundy operate approximately 170 cable television systems throughout the United States serving approximately 320,000 equivalent basic subscribers. Of the 170 systems, 87 (or over half) have less than 1,000 subscribers. With the exception of one system, in Connecticut, all of the systems operated by Tele-Media meet the criteria for small systems established by the Commission in the its small system order (Sixth Report and Order 11th Order on Reconsideration MM Docket No. 92-266 and MM Docket No. 93-215)("Small System Rules"). Since 1993, Tele-Media has been an active member of the Small Cable Business Association ("SCBA").

Tele-Media files these comments to assist the Commission in its consideration of certain proposed rules in the leased access rulemaking. As a small operator, Tele-Media understands the onerous burdens, although frequently unintended, which result from Commission rules intended to apply to the entire cable industry. Rules which put limitations on large cable operators, as we saw with rate regulation, often have devastating results on small operators. Without consideration of Tele-Media's comments and consideration of comments from organizations such as SCBA the leased access rules, as proposed by the Commission, could have an impact on small operators similar to the impact of rate regulation prior to the implementation of Small System Rules.

II. THE PROPOSED MAXIMUM RATE FORMULA LEADS TO A RESULT WHICH IS DIRECTLY CONTRARY TO THE AIMS OF THE CABLE ACT AND THE STATED GOALS OF THE COMMISSION.

Tele-Media agrees in concept with the Commission's proposal for setting rates for leased access channels. Unfortunately, following a review of the Commission's proposed formulas and its application to Tele-Media's cable systems, it is apparent that absent significant changes the formula leads to a result which conflict with the stated goals of the Commission in its Notice of Proposed Rulemaking ("NPRM"). The results were apparently neither contemplated nor intended by the Commission. The limited net opportunity costs and operating costs that an operator is permitted to recover and on which a profit may be earned are frequently not incurred by small operators or are so limited as to have no practical impact on the rate calculated. The formula essentially requires the small operator to give away the leased space on its cable systems. This result is absolutely contrary to the stated goals of both the Commission and Congress.

The Commission in its NPRM states:

> "We believe that leased access can be promoted without providing a subsidy to programmers by establishing a pricing scheme that is based on costs. Programmers who cannot afford the rate will not and should not gain access because they would imposed a financial burden on operators." NPRM @ Paragraph 66.

When Congress first established the commercial leased access requirements as part of the Cable Communications Policy Act of 1984 ("1984 Cable Act"), it expressly stated that the requirement should not adversely affect the economic position of cable operators:

> "The Committee's overriding goal in adopting this section is divorcing cable operator editorial control over a limited number of channels. In doing so, the Committee does not intend to adversely affect the cable operator's economic position, since it is not the cable operator's exercise of any

economic power, but his exercise of editorial control, which is of concern to the Committee. If not properly implemented, leased access requirements could adversely impact the economic viability of a cable system, thereby hurting the public." Joint Committee report at 51.

The application of the Commission's rules as presently proposed will adversely impact the economic viability of cable systems and both operators and subscribers will suffer.

III. THE COMMISSION'S FORMULA DOES NOT FULLY COMPENSATE SMALL SYSTEMS AS IT REQUIRES THEM TO GIVE AWAY FREE ACCESS.

The Commission's proposed cost formulas includes the following elements for which an operator may be compensated in establishing rates for leased access channels. These are the elements of opportunity cost:

a. **Lost Advertising Revenue.** Advertising revenue earned from advertising on a service bumped to provide a channel to a leased access programmer. (NPRM at 80)

b. **Lost Commission Revenue.** Commissions from shopping channels bumped for leased access programming. (NPRM at 82)

c. **Technology Costs.** The cost of technology required by the leased access programmer (e.g., scrambling costs for a premium channel offering).

These three elements of opportunity cost are quite limited and provide little relief to Small Operators. The Commission also proposes offsetting these amounts with the savings an operator realizes by no longer incurring program license fees for the program bumped by the operator (NPRM at paragraph 83). This further disadvantages small operators.

The second basket consists of operating costs. Although the Commission recognizes the operator's need to recover operating costs, it uses subscriber revenue as a proxy for the operating costs for tiered channels (NPRM at Paragraph 77). Again, because of the limitation on opportunity costs which are recoverable, the small operator is disadvantaged.

The Commission's proposal for taking the weighted average of all channel costs (ie. tiered and premium) and using the result as the cost of leasing any channel does not work for small operators. Applying this formula to most of Tele-Media's systems the result is that Tele-Media will be required to provide free leased access to its tiered channels. This result occurs because most of the Company's systems do not have any opportunity costs as defined by the Commission's proposal. Specifically, most of Tele-Media's systems, like most small operators, do not have any advertising insertion capability, the primary opportunity cost permitted by the proposed rules. Those systems that do have advertising insertion capability have limited insertion capacity because of their size and much of the advantage of the adverting is offset by the high price of programming that a company the size of Tele-Media incurs. As will be explained below, because programming cost are included in the net opportunity cost calculation, small operators, particularly those operating small systems will be additionally disadvantaged and otherwise impacted by the proposed leased access rules. Further, because the Commission assumes that there are no other incremental costs (ie. negotiating a leased access agreement and compliance with the leased access provisions) the leased access rate is ZERO. Congress did not intend that an operator should have to both open its system to leased access and give away the channels, essentially subsidizing the leased access programmer for providing access.

A leased access rate of zero directly conflicts with the federal statute on two points. First the statute provides that the Commission shall determine the maximum reasonable rate" an operator my charge for commercial leased access. (47 U.S.C. §532(c)(4)(A). The proposed rate of zero is clearly not reasonable because it fails to recognize any value conferred by the cable operator to the leased access programmer and although difficult to establish a rate, fails in any way to recognize any opportunity cost to the operator in the form of the goodwill of its subscribers when a channel, presently provided, and viewed by subscribers is removed from the cable system. Additionally, offering free leased access equates commercial leased access with public, education and government (PEG) access, clearly in violation of Congressional intent.

> The term commercial use is employed to distinguish from public access uses which are generally afforded free to the access user, whereas third party leased access envisioned by this section will result from a commercial arrangement between the cable operator and the programmer with respect to the rates, terms and conditions of the access use. (1984 Joint Committee Report).

The current formula will not allow small systems to impute a fee for tiered channel access and even if averaged with premium channel costs, will result in a low, even de minimis per channel rate.

IV. PART TIME LEASED ACCESS RATES WILL BE UNREASONABLE.

Not only will small system rates be low for full-time carriage, but when the low day-rate is partitioned, the per hour or half-hour rates are often less than current advertising rates. This creates the possibility for a flood of 30 and 60 minute one-time access request. This will create not only a logistical nightmare for small cable operators, but where an operator does have some limited advertising insertion capability there is the likelihood of advertisements migrate to the leased access channels where available time is considerably cheaper. Because of these unreasonably low rates established under the proposed cost formula, it is likely to cost less to by a full time leased access channel for a month or more than to insert advertising a few times a day for the same period.

V. PROGRAMMING COSTS LEAD TO ADDITIONAL BURDENS FOR SMALL CABLE OPERATORS.

As recognized by the Commission in its small systems rules, small operators have significantly higher programming costs. These higher costs for programming lead to much lower net opportunity cost than a larger operator even where a small operator has advertising insertion capability, as the larger operator pays less for its programming. Two similarly situated systems, owned by different size operators will have different net opportunity costs and therefore different leased access rates. A leased access programmer providing programming via satellite will be better served on a per subscriber basis by gaining access on 100, 1,000 subscriber systems owned by a small operator rather than one 100,000 subscriber system owned by a large operator. The rates are higher on the large operator's, large system, because net opportunity cost is higher. The rate charged by the small operator will be lower, regardless of whether or not the small operator has advertising insertion capability because the cost of programming is so much greater.

Because the price for gaining access to subscribers to small systems is significantly less than for accessing viewers on larger systems, small operators, under the proposed formula are going to bear a significant part of the leased access burden. Without relief, this burden may seriously threaten the economic viability of the small operator.

V. THE DEFINITION OF OPPORTUNITY COSTS OMITS AN ESSENTIAL AND SUBSTANTIAL COST OF SMALL SYSTEMS.

The Commission omits transaction costs from the definition of "opportunity costs" based on a flawed assumption. The Commission tentatively concluded that the cost of negotiating and administering a full-time leased access programming contract equals the comparable cost of a non-lease access programming cost. This assumption fails because the duration of the agreement and the number of systems covered varies between leased access and non-leased access programming.

There will in fact be higher total transaction costs due to more frequent execution of leased access agreements. Small cable enters into non-leased access programming agreements less frequently than leased access contracts. The average small cable programming agreement runs for a term of three to five years. Retransmission consent agreements, likewise runs for a term of three to five years. Typically, in Tele-Media's case, programming contracts are executed by the management company on behalf of all the Company's affiliates. Even retransmission consent agreements which may not apply company wide frequently still apply across numerous systems. This is not the case with leased access. Leased access programmers may "cherry pick" systems and because the rates which may be charged are system specific there must be an agreement for each system. By comparison, non-leased access programming prices tend to be based upon total number of subscribers throughout the organization. For example, the price for 30 minutes of leased access time on a 36 channel 500 subscriber system and a 60 channel 5,000 subscriber system, both owned by Tele-Media might be quite different on a per subscriber basis. However, the price paid for non-leased access satellite programming will be identical for both systems, under the corporate programming contract. In addition, the leased access programmers may make different requests for blocks of time for different systems.

VI. A PROGRAMMER REQUESTING LEASED ACCESS MUST PAY ALL EQUIPMENT COST REQUIRED TO CABLECAST THE PROGRAMMING.

The headend technology and support necessary to provide leased access results in high per subscriber costs for small systems. The Commission has previously recognized the high per subscriber costs incurred by small systems when adding headend equipment. Compliance with at least the first leased access requests will typically require addition of headend equipment; potentially headend equipment of more than one type. For example adding part time leased access programs on one channel delivered by 3 different methods (ie. satellite delivered programming, video tape and off air broadcast) would require the acquisition of three different types of equipment, costing in excess of $18,000 per channel. The addition of even one channel, requiring only one type of equipment could threaten the economic viability of the system. Small operators will incur additional costs because of the nature of small, rural systems. Frequently the headend is located far from the system office, possibly 30 minutes or more. The insertion of a tape or any other technical support necessary for the leased access programmer, requires a technician to go to the headend to make the change, costing considerable time and money which must be reimbursed, in whole, by the leased access programmer. As the amount of leased access time purchased decreases, the costs associated go up substantially for the operator.

To protect the economic viability of these small cable systems, the Commission must require the leased access programmer to pay the costs of the equipment necessary to add its programming, technical and support. Without this requirement the economic viability of the system will be challenged.

VII. THE COMMISSION MUST MODIFY ITS RATE FORMULA FOR SMALL SYSTEMS.

As the Commission realized when it issued the Small System Rules , small cable systems operated by small cable operators have very different cost structures and revenue requirements when compared to larger cable operators. As seen with the initial rate regulations, a set of standards applied to larger operators might have a devastating effect on smaller operators. As the Commission reached this understanding, it developed new rules which permit small operators to remain viable, while assuring reasonable cable television rates to the public.

Similar rate adjustments are needed in the area of leased access. The proposed cost formula, as demonstrated above, may be devastating to small operators. Tele-Media proposes the following changes to the rate formula.

a. Systems with 15,000 or Fewer Subscribers Should Be Permitted to Adjust the Rate Formula

The same rationale that justified the Commission's decision to provide rate relief to small operators applies to the computation of leased access rates. Both technology costs and transactional costs are incurred on a system by system basis. These costs are therefore distributed over a small system's subscriber base, resulting in a very high cost per subscriber.

The Commission's established small system definition of 15,000 or few subscribers should be applied to leased access rates as well. The costs associated with operating a small cable system recognized by the Commission when establishing rates for cable services, apply to leased access as well.

b. Allow Recover of Small System Transactional Costs.

The Rules should allow small systems to recover all transactional costs which represent high per subscriber costs for small systems. Small systems should have the option to include actual or estimated transaction costs in the leased access rate. This by itself, however, may lead to disputes between operators and leased access applicants regarding the reasonableness of the proposed pass-through. To avoid this problem, the Commission should establish a minimum transaction cost that an operator may include in his calculation. The amount of $1,000 should be presumptively includable, as a reasonable, conservative approximation of the cost of entering into the transaction. Operators that incur significantly higher than expected costs could justify the higher amount.

c. **Allow Up-Front Recovery of All Technical Costs.**

As described, the Commission must allow small systems to recover all technology costs incurred in response to a leased access request from that first contract, or first new piece or equipment required. Because small systems historically received few, if any, requests for leased access, they cannot rely on future contracts to recover ca;ital investments. Additionally, to protect operators from defaults or cancellation of the contracts, the rules should permit small systems to require advance deposits to cover payment for all technology costs. Although this may appear harsh, the full cost of leased access must be borne by the party seeking access. Congress explicitly stated that implementation of leased access may not threaten the viability of cable operators. From a practical perspective, failure to guarantee payment for these costs would likely preclude small systems from borrowing funds to purchase the necessary equipment, making compliance with leased access rules impossible.

d. Small Cable Should be Allowed to Use Market Pricing.

As demonstrated above, absent changes to the proposed leased access rate formula, small cable will often be required to provide leased access for free or at a de minimis cost. With access costs so low, one or a few individuals can monopolize a systems's leased access time. Other's seeking access will pay market rate for access, clearly contrary to the statutory goal of increased program diversity.

Because the base leased access set aside will quickly disappear to a few or maybe even one programmer, anyone else seeking leased access will be required to pay market rate. To avoid this problem, Tele-Media proposes the market method for setting all leased access rates for small cable. If a leased access programmer believes that a small cable operator has abused the system, then it can refer the matter to the Commission for resolution.

This proposal will help small cable avoid the potential of undue burden falling upon small cable where rates are certain to be much cheaper, if not free.

VIII. SMALL CABLE SHOULD NOT BE REQUIRED TO IMMEDIATELY BUMP PROGRAMMING TO CREATE LEASED ACCESS CAPACITY.

Immediate and full implementation of leased access requirements on small cable will have a substantial disruptive effect on subscribers to those system. Congress did not intend this effect. The Commission must implement leased access channel capacity requirements carefully on small cable operators.

Congress never intended leased access implementation to cause sudden or massive displacement of incumbent services. When Congress first established leased access requirements in the 1984 Cable Act, it specifically protected incumbent program offerings from being bumped to provide leased access capacity. Rather operators were only required to provide leased access out of future channel capacity. Further, Congress expressly contemplated that leased access be provided in a manner consistent with the growth and development of cable systems.

IX. PHASED IMPLEMENTATION FOR SMALL CABLE DOES NOT HINDER ACHIEVING DIVERSITY IN PROGRAMMING.

Congress made clear that the 1984 Act sought to increase diversity in programming by mandating leased access:

> Leased access is aimed at assuring that cable channels are available to enable program suppliers to furnish programming when the cable operator may elect not to provide that service as part of the program offerings." Joint Committee report @47

Between 1992 and 1984 many large MSOs became vertically integrated with program providers giving rise to new diversity concern by Congress. Small cable, including Tele-Media has not become part of this pattern. Small cable is not vertically integrated. Small cable does not have vested interests in programming services. Providing special treatment to lessen the burden on small cable will not frustrate the Congressional goal of advancing diversity in programming.

X. LEASED ACCESS OBLIGATIONS SHOULD BE PHASED IN OVER TIME.

Because of the lack of interest in leased access until this time, Tele-Media has used most of its capacity to provide service to its subscribers. In small channel locked system, the demand by subscribers is already greater than the Company's ability to upgrade to add new channels. Now if the Commission sets rates that make placing leased access on small cable systems attractive, the disruption Congress sought to avoid in 1984 will be forced upon our subscribers. There will be mass confusion and significant subscriber anger should Tele-Media be required to immediately replace 3, 4 or more channels of programming on its system at one time, especially programming that is likely not to be desired by subscribers. To prevent this, the Commission should require carriage only on a phased in basis to avoid mass disruption of program line-ups.

Small systems should be required to provide only a single channel of leased access programming initially. A cable operator should not be required to provide another leased access channel for a period of one year following the effective date of the rules. Each year, if the preceding channels have been fully programmed, as defined by Commission regulations, for a consecutive six month period, then the system would have to provide another leased access channel, until it had filled its statutory quota. A phased in approach to the provision of leased access requirements track with the statutory mandate that development be "in a manner consistent with the growth and development of cable systems."

Phased implementation will also advance the Congressional goal of advancing the development of cable television. Many small cable systems have limited channel capacity. Expansion is more difficult due to higher operating costs and restricted access to capital. Consequently, many small systems have 36 or fewer channels. If these systems upgrade their systems and add five or ten channel, knowing that four or five will immediately be lost to leased access demands, small systems will not be willing to build upgrades or will banks be willing to finance upgrades, if the operator has no control over programming those channels.

XI. THE COMMISSION SHOULD LIMIT THE RESALE OF CHANNELS.

The Commission must limit the resale of leased access channels. The Commission has proposed a rate formula which is intended to compensate operators while keeping rates reasonable for leased access programmers. Allowing the unregulated resale of leased access channels will once again make market rate the rate charged. This is clearly what the Commission is trying to avoid in the first place by establishing a rate formula. Further, there is an inherent unfairness in taking the leased access time from an operator at a price that might not be compensatory and then allowing its resale at a price equal to or greater than what the operator could have earned. This certainly does not accomplish the Commission's goals of advancing leased access usage. Only the companies who resell the time will benefit. The operator will suffer. In addition, neither the programmer nor subscribers gain any advantage with that type of system.

XII. CONCLUSION.

The Commission in its Small System Rules was correct in its determination that one set of rules for the entire cable industry causes hardship to small operators. The Commission developed new rules which allow small operators to profitably operate their business while meeting the goals of Congress by charging fair rates to subscribers. The Commission must do the same thing with leased access. The rules as proposed will cause a hardship to small operators, just as the initial rate regulations did. The Commission must consider the comments of Tele-Media, SCBA and others and adopt rules appropriate for small operators and prevent further hardship before it occurs.

Respectfully Submitted,

Tele-Media Corporation of Delaware

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